IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

NCF FINANCIAL, INC., a Washington corporation, Appellant, v. WEBFORIA, INC., a.k.a. LIVE CONTENT, INC., a Washington corporation; and ST. PAUL FIRE AND MARINE INSURANCE COMPANY, a Minnesota corporation, Respondents.	)	No. 56797-7-I DIVISION ONE UNPUBLISHED FILED: August 7, 2006

COX, J. -- This is a property insurance coverage dispute involving a loss that occurred in early 2002. The trial court granted summary judgment to St. Paul Fire and Marine Insurance Company, dismissing the claims of NCF Financial, Inc., the claimant. Because NCF was only entitled to make a claim as an additional insured under the insurance policy in effect from July 1, 1998 through July 1, 1999, and failed to make a timely claim, we affirm.

NCF leased computer equipment to Webforia, Inc. under a master lease. The lease required Webforia to obtain insurance coverage for the leased equipment and name NCF as an additional insured. Webforia obtained property insurance through St. Paul Fire and through United States Fidelity and Guaranty

Insurance Company (USF&G), a wholly owned subsidiary of St. Paul. USF&G was the principal operating subsidiary of USF&G Corporation, which merged with St. Paul in January 1998.

The first two policies were issued through USF&G. They had terms from July 1, 1997 through July 1, 1998, (the "First Policy"), and July 1, 1998 through July 1, 1999 (the "Second Policy"), respectively. Webforia obtained insurance coverage from another insurer for the period from July 1999 through July 2000. Webforia obtained its third and fourth policies from St. Paul for the periods August 1, 2000 through September 1, 2001 (the "Third Policy"), and September 1, 2001 through its cancellation on February 15, 2002 (the "Fourth Policy"), respectively. The bankruptcy court apparently ordered rejection of the latter policy as part of Webforia's bankruptcy filing on January 31, 2002.

Subsequent to the bankruptcy court order rejecting the last insurance contract, Webforia began returning the leased computer equipment to NCF as part of the effort to liquidate its assets. When NCF conducted its inventory in connection with repossession of its equipment, it discovered that Webforia had failed to return the majority of the leased equipment.

NCF submitted an insurance claim to St. Paul under Webforia's four insurance policies for the loss of equipment. St. Paul denied the claim.

In January 2004, NCF sued St. Paul for breach of contract and other claims. St. Paul moved for summary judgment, which the trial court granted.

NCF appeals.

COVERAGE

Additional Insured

NCF argues that it is an additional insured and entitled to coverage under the four policies issued by St. Paul. We hold that NCF was only an additional insured under one of the policies and that it failed to timely make a claim for loss under that policy.

In a summary judgment motion, the moving party bears the initial burden of showing the absence of an issue of material fact.[1] If the moving party is a defendant and meets this initial showing, then the inquiry shifts to the party with the burden of proof at trial, the plaintiff.[2] If, at this point, the plaintiff "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial," then the trial court should grant the motion.[3]

The determination of whether coverage exists is a two-step process: The insured must first establish that the loss falls within the "scope of the policy's insured losses."[4] Then, to avoid responsibility for the loss, the insurer must

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[1] See LaPlante v. State, 85 Wn.2d 154, 158, 531 P.2d 299 (1975).

[2] Young v. Key Pharmaceuticals, Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

[3] Id.

[4] Diamaco, Inc. v. Aetna Cas. & Sur. Co., 97 Wn. App. 335, 337, 983 P.2d

show that the loss is excluded by specific language in the policy.[5] We interpret an insurance contract as a question of law. We review de novo a summary judgment order, considering the facts in a light most favorable to the nonmoving party.[6]

We start with the undisputed facts. According to NCF, the loss occurred sometime after the Webforia bankruptcy filing on January 31, 2002. Sometime after that date, NCF discovered that its equipment was missing when it conducted its inspection for repossession from Webforia.

There also appears to be no dispute over the effective dates of the four policies issued by St. Paul. Nothing in the record shows that NCF was an additional insured named under any policy other than the policy in effect from July 1, 1998 to July 1999 – the Second Policy.[7]

With these undisputed facts in mind, we proceed to determine whether there are either genuine issues of material fact or questions of law that require us to overturn the trial court's grant of summary judgment to St. Paul.

Second Policy

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707 (1999) (quoting Schwindt v. Underwriters at Lloyd's of London, 81 Wn. App. 293, 298, 914 P.2d 119 (1996), review denied, 140 Wn.2d 1013 (2000)).

[5] Id.

[6] Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998); see also Del Guzzi Constr. Co. v. Global Northwest, Ltd., 105 Wn.2d 878, 882, 719 P.2d 120 (1986).

[7] The Evidence of Property Insurance states that NCF Financial is an Additional Insured for the policy effective July 1, 1998 and expiring on July 1, 1999. Clerk's Papers at 101.

The record establishes that NCF is neither an insured nor an additional insured under any policy except the policy whose term began on July 1, 1998 and expired on July 1, 1999. Moreover, that policy, like the others, has a two-year limitations period within which an action under the insurance contract must be made. Only an insured or an additional insured has standing to commence such an action.[8]

It is undisputed that NCF filed this action on January 28, 2004. That is more than two years after the expiration of the term of the Second Policy on July 1, 1999. Thus, the bar date was in July 2001, well before NCF filed this action. Accordingly, there is no coverage under the Second Policy, unless NCF persuasively addresses the issues we discuss in the rest of this opinion.

We first note that even if NCF had timely commenced this action under the Second Policy, there would have been no coverage. That is because the loss did not occur until after January 31, 2002, which is outside the policy term of the Second Policy, July 1, 1998 to July 1, 1999.

NCF does not contest any of these facts. Rather, it rests its claim that coverage exists on the bases we now consider.

Notice

NCF first contends that as an additional insured under the Second Policy

[8] Postlewait Constr., Inc. v. Great American Ins. Cos., 106 Wn.2d 96, 99, 720 P.2d 805 (1986) (holding that a lessor of personal property who was not named as an insured, a loss payee, or otherwise was not an intended third-party beneficiary of an insurance contract and thus had no standing to sue an insurer for breach of the contract).

it was entitled to notice before St. Paul chose not to renew, change, or cancel the policy. We hold that no notice by St. Paul was required here because none of these three events occurred.

The Evidence of Property Insurance (EPI) Certificate states that NCF was an additional insured on the Second Policy in effect from July 1, 1998 through July 1, 1999. The EPI provided:

> U.S. Bank of Washington is included as a Loss Payee and ***NCF Financial, Inc. is included as an Additional Insured as respects Master Lease No. 97-08080U***, Supplementary Schedule No. 001. . . . Should the policy be ***terminated***, the company will give the additional interest identified below 45 days written notice and will send notification of any changes to the policy that would effect that interest, in accordance with the policy provisions or as required by law.[9]

Assuming without deciding that NCF was entitled to notice under this provision of the EPI, the plain words state that such notice only applied in the event of termination of the policy. However, the policy was not terminated. Likewise, nothing in the record indicates that St. Paul made a decision not to allow the insured to renew the policy. Rather, the policy expired of its own terms.

NCF relies on Olivine v. United Capitol Ins. Co.[10] for support. That case is inapposite.

In Olivine, the first named insured gave a premium finance company a power of attorney to request cancellation of the policy in the event of

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[9] (Emphasis added.)

[10] 147 Wn.2d 148, 52 P.3d 494 (2002).

nonpayment of premiums. The first named insured received notice of the requested cancellation. Olivine, the second named insured, did not give the finance company a power of attorney and was not notified of the requested cancellation.

The court held that, pursuant to the notice requirements of RCW 48.18.290, the insurer's failure to notify Olivine of the cancellation of the policy left it in effect with respect to the second named insured.[11] The court held that if one insured cancels, the insurer may not cancel the interests of the other insureds without notice to each of them.[12] Notice enables the insureds "to take appropriate action in the face of impending cancellation of an existing policy . . .

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[11] RCW 48.18.290 states in pertinent part:

> (1) Cancellation by the insurer of any policy which by its terms is cancellable at the option of the insurer, or of any binder based on such policy which does not contain a clearly stated expiration date, may be effected as to any interest only upon compliance with the following:
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> (a) Written notice of such cancellation, accompanied by the actual reason therefor, must be actually delivered or mailed to the named insured not less than forty-five days prior to the effective date of the cancellation except for cancellation of insurance policies for nonpayment of premiums, which notice shall be not less than ten days prior to such date and except for cancellation of fire insurance policies under chapter 48.53 RCW, which notice shall not be less than five days prior to such date;
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> (b) Like notice must also be so delivered or mailed to each mortgagee, pledgee, or other person shown by the policy to have an interest in any loss which may occur thereunder. For purposes of this subsection (1)(b), "delivered" includes electronic transmittal, facsimile, or personal delivery.

[12] Olivine, 147 Wn.2d at 166.

by either making the payments in default, obtaining other insurance protection, or preparing to proceed without insurance protection."[13]

The plain words of the statute require notice in the event of cancellation of an existing policy.[14] It does not require notice where, as here, a policy expires of its own terms. Therefore, St. Paul was not required to give notice to NCF in this case. Accordingly, we reject the argument that the absence of notice somehow extended coverage beyond the termination date of July 1, 1999 stated in the Second Policy.

Premium Refund

NCF next contends that, even if St. Paul was not required to give it notice, there is no evidence that "USF&G ever refunded [Webforia's] prepaid premium that was used to extend coverage from July 1, 1999 through July 1, 2000." According to NCF, this is a question of fact that precludes summary judgment. We hold that there is no genuine issue of material fact arising from the exchanges of communication on which NCF relies for its argument.

A material fact for purposes of summary judgment is one on which the outcome of the litigation depends.[15] If reasonable minds could reach only one conclusion, there is no genuine issue of material fact.[16]

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[13] Id. at 162.

[14] This section is entitled "Cancellation by Insurer."

[15] Carlton v. Black (In re Estate of Black), 153 Wn.2d 152, 160, 102 P.3d 796 (2004).

[16] Ellis v. City of Seattle, 142 Wn.2d 450, 458, 13 P.3d 1065 (2000).

Shortly before the Second Policy expired of its own terms in July 1999, Webforia instructed its insurance broker, Acordia, not to renew coverage with USF&G when the Second Policy expired. By letter dated June 28, 1999, Marla Hogan, Acordia's account manager, advised Ellen Duncan at Webforia: "As of July 1st [1999] we will close our file and will instruct [St. Paul] to do the same."

By e-mail dated July 6, 1999, Tonya Baker, another Acordia employee, advised Hogan regarding Webforia. It stated: "The policy renewed 7/1/99. The premium is $1,447.00 for the package and $1,857.00 for the auto. Agency billed, prepaid. If you have any questions, please let me know."

By e-mail dated July 7, 1999, Kim Stanley informed Baker: "Tonya, You sent an e-mail to Marla [Hogan] on 7/6 indicating renewal premiums on the above account. ***This account is not to be renewed as it was placed with Chubb [Insurance]*** through Ned Sander (whose [sic] no longer here). ***Please let me know if you need anything else for non renewal***."[17]

There are no other communications in the record on this subject after this last message.

NCF relies on the portion of Baker's email stating "Agency billed, prepaid." The argument is that NCF paid a premium to St. Paul, it was never refunded, and the lack of a refund renewed the Second Policy for another year beyond its July 1, 1999 expiration date. The meaning of this sentence on which NCF relies is unclear, but irrelevant. The subsequent e-mail makes clear there

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[17] Clerk's Papers at 490 (emphasis added).

was no renewal with St. Paul. Rather, new insurance was secured with Chubb Insurance. Even if a premium had been paid and the Second Policy renewed for one year, there is no material issue of fact. An extension of one year would have done nothing to provide coverage for a loss that occurred sometime after January 31, 2002.

Accordingly, we also reject this argument based on a renewal based on alleged failure to return a premium that NCF allegedly paid.

The trial court properly granted summary judgment to St. Paul. Because of our resolution of these dispositive issues, we need not reach the exclusion provisions of the policy or whether NCF had an insurable interest in the property.

We affirm the summary judgment order.

Cox, J.

WE CONCUR:

Appelwick, C.J.

Becker, J.